Supreme Court, U.S.
FILED

9 72009 APR 8

OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of The United States
October Term, 1997

BARBARA MONSKY,
Petitioner,

v.

HONORABLE HOWARD J. MORAGHAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

Petitioner:

BARBARA MONSKY, pro se
14 Shepard Road
Danbury, CT 06810
Tel. (203) 748-8881

51 pp

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

(a) Questions Presented for Review:

1. Did the United States Court of Appeals for the Second Circuit err in finding petitioner's complaint fails adequately to plead denial of her constitutional right of access to the courts despite its well-pleaded allegation of repeated offensive nuzzling of the defendant judge's dog under her skirt within the confines of the state superior court pursuant to the judge's morning ritual?

2. Did the United States Court of Appeals misconstrue the United States Supreme Court holding in Lewis v. Casey, 116 S.Ct. 2174 (1996) to bar a non-inmate litigant. from pursuing a denial of-access-to-the-courts claim without a specific allegation of actual injury to her rights and interests in the litigation?

3. Did the United States Court of Appeals for the Second Circuit err in setting a threshold of actual injury to women litigants alleging sexual harassment which violates their rights of access to the courts, namely, that they need allege that the sexual harassment must effectively drive them out of the courthouse to be actionable?

Table of Contents

(a)	Questions Presented for Review	1
(b)	Parties to the proceeding	2
(d)	Citations of reported opinions and orders	3
(e)	Statement of basis for jurisdiction	4
(f)	Constitutional provisions	5
(g)	Statement of the case	6
(h)	Argument	11
	1. Summary of Argument	11
	2. The right of access to the courts is a fundamental constitutional right of citizenship; intentional interference with the right by a state actor states a cause of action under 42 U.S.C. §1983	11
	3. The plaintiff need not be successfully deprived of the right of access to the courts to state a claim in interference with the right of access	12
	4. The plaintiff did sufficiently allege actual injury	16
	5. The complaint sufficiently alleges intentional violation of the plaintiff's right of access, equal protection and due process rights sufficient to withstand a Fed.R.Civ.P. 12(b)(6) motion to dismiss	17
	a. The equal protection and due process claims are	

independent of the right-of-access claims 18

b. A §983 denial of equal protection is sufficiently alleged 18

c. A §983 due process claim is sufficiently alleged 20

6. Conclusion 21

Appendix

Complaint
Decision of the U.S. Court of Appeals
Notice of Denial of Motion for Rehearing

Table of Authorities

Andrews v. City of Philadelphia
895 F.2d 1469 — **19**

Bounds v. Schneider
430 U.S. 817 — **12**

California Motor Transport Co. v. Trucking
Unlimited, 404 U.S. 508 — **11**

Chambers v. Baltimore & Ohio R.R.
207 U.S. 142 — **12**

Crowder v. Sinyard
884 F.2d 804 — **12,15**

Davis v. Passman
442 U.S. 228 — **19**

Docktor v. Rudolf Wolff Futures, Inc.
684 F. Supp. 532 — **17**

Doe v. Taylor Independent School District
15 F.3d 443 — **20**

Franco v. Kelly
854 F.2d 584 — **12**

Ingraham v. Wrigh
430 U.S. 651 — **20**

Lamar v. Steele
693 F.2d 559 — **6**

Lewis v. Casey
116 S.Ct. 2174 — **13,14, 15, 16, 17**

Morello v. James
810 F.2d 344 — **12**

Nichols v. Nix
810 F.Supp. 1448 14

Poe v. Haydon
853 F.2d 418 19

Priest v. Rotary
634 F.Supp. 571 17

Procup v. Strickland
760 F.2d 1107 14

Quinn v. Nix
983 F.2d 115 7

Sanders v. St. Louis County
724 F.2d 665 13

Saulpaugh v. Monroe Community Hospital
4 F.3d 134 19

Silver v. Cormier
529 F.2d 161 13

Simmons v. Dickhaut
804 F.2d 182 12

Thomas v. Collins
323 U.S. 516 15

United Mine Workers v. Illinois State Bar Ass'n
389 U.S. 217 12

U.S. Ex Rel. Cleggett v. Pate
22 F.Supp. 818 15

U.S. v. Lanier
33 F-3d 639 21

Washington v. James
782 F.2d 1134 14

---

97 Harvard Law Review 1449 19

1 Harvard Women's Law Journal 19 19

Judicial Misconduct, Massachusetts School of Law Review, Summer 1997 20

New York Times, Connecticut Weekly, October 12, 1997, page I 20

17 Sexual Harassment & Judicial Review 27 20

45 University of Miami L. Rev. 817 20

(b) Parties to the proceeding

Plaintiff-Appellant-Petitioner
Barbara Monsky
14 Shepard Road
Danbury CT 06810

Defendant-Appellee-Respondent
Hon. Howard J. Moraghan
Judge of the Superior Court, State of Connecticut
146 White Street
Danbury CT 06810

(d) Citations of reported opinions and orders

Monsky v. Moraghan, 950 F.Supp. 476 (D.Conn. 1997)

Monsky v. Moraghan, ____F.3d_____(1998)

(e) Statement of basis for jurisdiction

(i) Judgment was entered by the United States Court of Appeals for the Second Circuit on October 2, 1997.

(ii) Plaintiff-Petitioner's Motion for Rehearing was ordered denied by the Court of Appeals on January 8, 1998.

(iii) 28 U.S.C. §254 confers on this Court jurisdiction to review on a writ of certiorari the judgment or order in question.

(f) Constitutional provisions

First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(g) Statement of the case

The Plaintiff, Barbara Monsky (hereinafter "Ms. Monsky") brought suit on September 23, 1996 as a proposed class action complaint against Howard J. Moraghan (hereinafter "Judge Moraghan"), a judge of the Superior Court of the State of Connecticut assigned to the Judicial District of Danbury.

Ms. Monsky alleges violations of her right of access to the courts, equal protection, due process and First Amendment liberties and invokes the jurisdiction of the U.S. District Court, District of Connecticut, under the provisions of 28 U.S.C. §§1331, 1343(3) and 1367(a) and 42 U.S.C. §§1981, 1983 and 1988.

The complaint alleges that Judge Moraghan employed his dog to sexually harass her on multiple occasions within the confines of the clerk's office of the Superior Court at Danbury.

The suit seeks injunctive relief by which to enjoin the judge from taking his dog into court and damages and attorney's fees.

The complaint alleges that Ms. Monsky, a resident of

Danbury, Connecticut, at all times pertinent to the complaint, has been a civil litigant in the Superior Court for the Judicial District of Danbury, having instituted a suit arising from a boundary dispute with her neighbor. With reference thereto, Ms. Monsky has frequently appeared at the clerk's office of the Superior Court to examine the file in the civil action as well as to review other Superior Court files. (Complaint 7)[1]

On no fewer than three (3) separate occasions during the previous year, while Mr. Monsky was present in the public area of the clerk's office at the Superior Court, she was approached from the rear without warning by a large unleashed and unmuzzled dog. (Complaint 8)

On each such occasion, the dog aggressively nuzzled the petitioner in such manner that it raised her skirt, poked its snout under her skirt and projected its snout toward Ms. Monsky's crotch. (Complaint 9)

On each such occasion, the petitioner did nothing whatsoever to provoke such conduct by the dog. (Complaint 10)

[1] A copy of the complaint appears in the appendix hereto.

On each such occasion, the owner and keeper of the dog, Judge Moraghan, stood observing the dog's activity from a distance of several feet and did nothing to restrain the dog. (Comaplint 11)

On each such occasion, after nuzzling Ms. Monsky, the dog proceeded to approach other women from the rear without warning and repeat the upward thrust of the snout, the raising of their skirts, and the projection of the snout upward toward the women's crotches. (Complaint 12)

On each such occasion, Judge Moraghan, the owner and keeper of the dog, stood watching from several feet away and did nothing to restrain the dog. (Complaint 13)

Each time Ms. Monsky was so nuzzled by the dog, she was startled by the unprovoked and offensive conduct and her sense of having been violated was heightened and intensified by her observation that on each such occasion the fact of Judge Moraghan broke into a smirk as he observed Ms. Monsky's obvious discomfort. (Complaint 14)

On each such occasion, Judge Moraghan then quickly escorted the dog from the public area of the clerk's office into

the secured and non-public area, without words being exchanged. (Complaint 15)

The conduct of the dog caused Ms. Monsky to suffer extreme emotional distress. (Complaint 16)

In repeatedly failing to restrain the dog from its offensive conduct, knowing that the dog, if unrestrained, would continue to practice its offensive conduct, Judge Moraghan intentionally inflicted emotional distress upon Ms. Monsky and his conduct was extreme and outrageous. (Complaint 19)

Judge Moraghan knew or should have known that the dog, if unrestrained, would single out women in skirts, and the dog did repeatedly select women in skirts for offensive nuzzling, and did leave all other persons alone. (Complaint 20)

During all times mentioned in the complaint, Ms. Monsky was engaged in exercising her constitutionally protected right of access to the courts within the public area of the clerk's office of the Danbury Superior Court. (Complaint 21)

The conduct of Judge Moraghan and his dog interfered

with Ms. Monsky's constitutionally protected right of access to the courts. (Complaint 22)

Judge Moraghan's conduct was intentional and intended to harass Ms. Monsky as a woman for exercising her constitutionally protected right of access to the courts and thereby deprive her of her constitutionally protected rights to due process, equal protection of the law and First Amendment liberties. (Complaint 23)

Judge Moraghan abused his authority as a judge of the Superior Court maliciously to frighten, shock, humiliate and vex Ms. Monsky as a woman for exercising her constititutionally protected right of access to the courts. (Complaint 24)

Acting under color of state law, Judge Moraghan deprived Ms. Monsky of her constitutionally protected rights to due process, equal protection and First Amendment liberties. (Complaint 18)

Judge Moraghan moved to dismiss the complaint on October 22, 1996, alleging a failure to state a claim upon which relief may be granted on the grounds that Judge Moraghan was not acting under color of state law. The motion was filed

pursuant to Fed.R.Civ.P. 12(b)(6).

The U.S. District Court (Goettel, J.), over Ms. Monsky's objection, granted the motion to dismiss, finding that the complaint did not sufficiently allege that Judge Moraghan was acting under color of state law. The petitioner moved to amend the complaint to address the deficiency asserted by Judge Goettel; the motion was denied, as was the petitioner's motion for reconsideration.

On December 39, 1996, the petitioner filed Notice of Appeal and appealed to the United States Court of Appeals for the Second Circuit.

Following argument on the appeal, the Court of Appeals affirmed dismissal of the complaint.[2] While the Court of Appeals found that the complaint sufficiently alleges that Judge Moraghan was acting under color of state law, it ruled that the complaint fails adequately to plead denial of the constitutional right of access to court.

In its decision, the Court of Appeals also asserted that Ms. Monsky did not claim prejudice to her pursuit of her

[2] A copy of the decision appears in the appendix hereto.

pending state-court litigation, nor that she suffered "actual injury" in her exercise of the right of access. Additionally, the Court of Appeals determined that the inadequacy of Ms. Monsky's court access claim renders her entire federal cause of action insufficient to survive a motion to dismiss.

On October 16, 1997, Ms. Monsky petitioned the Court of Appeals for rehearing. The petition for rehearing asserted that Ms. Monsky did claim prejudice and actual injury and that her claims of federal causes of action are not dependent on the validity of the right of access claim. On January 8, 1998, the Court of Appeals denied the motion for rehearing.[3]

[3] A copy of the order is annexed hereto.

(h) Argument

This Court should grant the petition for a writ of certiorari because the Court of Appeals departed radically from decisions of this Court on the constitutional right of access to the courts.

This is a sexual harassment case involving the fundamental constitutional right of access to the court. This is not a sexual harassment-in-the-workplace case.

1. Summary of Argument

The right of access to the courts is a fundamental constitutional right. Interference with the right of access by a state actor acting with intent states a cause of action under 42 U.S.C. §1983. The interference need not actually prevent the plaintiff from exercising the right: interference with the right is itself a constitutional deprivation. The plaintiff did suffer actual injury. The complaint sufficiently alleges a §1983 cause of action. The judgment of the Court of Appeals should be reversed and the case remanded to the district court for further proceedings.

2. The right of access to the courts is a fundamental constitutional right of citizenship; intentional interference with the right by a state actor states a cause of action under 42 U.S.C. §1983.

This Court has well recognized that there is a constitutional right to unfettered access to the courts, which is one aspect of the right to petition for redress of grievances. California Motor Transport Co. v. Trucking Unlimited, 414 U.S. 508, 510 (1972). This right is "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222.

This "right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907).

The right of access is a fundamental right. Bounds v. Smith, 430 U.S. 817, 828 (1977). The fundamental right of access to the courts is substantive and therefore "cannot be obstructed, regardless of the procedural means applied."

Morello v. James, 810 F.2d 344, 347 (2d Cir. 1987). Intentional obstruction of the right of access is precisely the sort of oppression that §1983 is intended to remedy. Franco v. Kelly, 854 F.2d 584, 589 (2d Cir. 1988). An allegation of intentional violation of the right of access to the courts by a state actor states a cause of action under 42 U.S.C. §1983. Simmons v.Dickhaut, 804 F.2d 182, 185 (lst Cir. 1986).

In its most obvious and formal manifestation, the right of access protects one's **physical** access to the courts. Crowder v. Sinyard, 884 F.2d 804, 811-12 (5th Cir. 1989).

3. The plaintiff need not be successfully deprived of the right of access to the courts to state a claim in interference with the right of access.

A plaintiff need not successfully be prevented from filing a suit to state a claim in interference with the right of access to the courts. "The contrary rule would result in the anomaly of protecting only those individuals who remain out of court." Lamar v. Steele, 693 F.2d 559, 562 (5th Cir. 1983); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) (Agency official threatened to withhold money admittedly due and owing the

plaintiffs if they instituted legal proceedings against the agency on an unrelated and independent matter. The Tenth Circuit, after stating that the "right of access to the courts cannot be infringed or burdened," held that the official's threat burdened and chilled the plaintiffs' right of access even if the threat was not "actually effective"); Sanders v. St. Louis County, 724 F.2d 665, 666 (8th Cir. 1983) ("It is not necessary that the inmate succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the inmate's right of access.")

The Court of Appeals in the matter at hand ruled that the case of Lewis v. Casey, 116 S.Ct. 2174 (1996) -- the sole authority relied on -- requires the present plaintiff, Ms. Monsky, to have asserted in her complaint that she suffered "actual injury" in her exercise of her right of access to the courts. (Court of Appeals decision, appearing in the appendix hereto, page 9)

The Court of Appeals' reliance upon Lewis v. Casey is misplaced. Lewis v. Casey is a case involving Arizona prison inmates. The plaintiff, Ms. Monsky, is not a prison

inmate. She is a free woman litigant with full rights of citizenship.

The Court of Appeals was evidently sensitive to the fact that the sole case relied upon to affirm dismissal of the plaintiff's case is a prison inmate case. The Court of Appeals even substituted the word "plaintiff" in its citations from Lewis v. Casey for the word "inmate," which is the word which actually appears in Justice Scalia's majority decision.

This is a distinction with a difference.

Unlike free, law-abiding citizens, such as the plaintiff, prison inmates are not entitled to an absolute or unconditional right of access to the courts. Procup v. Strickland, 760 F.2d 1107, 1110 (5th Cir. 1985). Indeed, prsoners' rights of access to the courts may be regularly obstructed by state authorities as long as their conduct is "reasonable." Washington v. James, 782 F.2d 1134 (2d Cir. 1986). Deprivation of inmates' rights and liberties, including impairment of litigating capacity outside of challenging their sentences or the conditions of confinement "is an incidental and perfectly constitutional consequence of conviction and incarceration." Lewis v.

Casey, 135 L.Ed.2d 606, 620. While prisoners do not lose all of their constitutional rights while behind bars, Quinn v. Nix, 983 F.2d 115, 118 (8th Cir. 1993), their constitutional rights are significantly limited or substantially constrained in order to further legitimate objectives of the penal system, particularly in the interest of security. Nichols v. Nix, 810 F.Supp. 1448, 1455 (1993), aff'd, 16 F.3d 1228 (8th Cir. 1994).

Writing for a divided Court in Lewis v. Casey, Justice Scalia specifically and explicitly addressed the issue of right-of-access to the right possessed by prison inmates. Lewis v. Casey, Id. 616. The authorities cited in his majority opinion are prison inmate cases. As the Court of Appeals has noted (See Decision, page 9), Justice Scalia explained that the requirement of "actual injury" derives from the doctrine of standing. Justice Thomas, who wrote a concurring opinion in Lewis v. Casey, emphasized that the case "is **not** about a right of 'access to the courts.'" Id. 627 (Emphasis added.) The value of Lewis v. Casey as providing controlling precedent for the present case is dubious at best.

While it is doubtless correct that very many "right of

access" cases have arisen from a prison context, these cases need to be carefully distinguished from the non-prison context.

"If the constitutional right of access has any sweep outside the prison context, it must be based upon a more nuanced interpretation of the requirement that such access be 'adequate, effective and meaningful.'" Crowder v. Sinyard, supra 811. If a plaintiff proves that his or her constitutional right of access to the courts has been violated, a constitutional deprivation has occurred and he or she will have a §1983 cause of action against the state actor causing the deprivation. Id. 812.

It should be the case that "unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or legal paper, they need merely travel to the courthouse or even just the nearest mailbox." Id. 811-12.

"The right to petition has a sanctity and a sanction not permitting dubious intrusions." Thomas v. Collins, 323 U.S. 516, 530.

A litigant is entitled to "free and unhampered access to

the courts." United States ex rel. Cleggett v. Pate, 229 F. Supp. 818, 821-22.

A physical interference with the plaintiff's exercise of her right of access to the courts, if created by the intentional conduct of a state actor to interfere with such right of access, is all that is constitutionally required for her §1983 right-of-access claim. Such physical interference impermissibly burdens the plaintiff's fundamental right to unfettered access. The interference is the constitutional injury.

4. The plaintiff did sufficiently allege actual injury.

The Court of Appeals determined that Lewis v. Casey controls this case, that the plaintiff was required to assert a claim of actual injury, and that she failed to do so. (Decision, pages 9 - 11)

Contrary to the findings of the Court of Appeals, the plaintiff petitioner sufficiently alleges actual injury in her complaint.

The complaint, a copy of which is annexed hereto, alleges both a repeated offensive physical assault and emotional harm. (Complaint 8, 9, 10, 14, 16) The complaint

asserts that such injuries occurred inside the clerk's office of the state courthouse (Complaint 7, 8) where she was engaged in constitutionally protected conduct in reviewing a court file in a case in which she is a party and in reviewing other files in which she has an interest as an advocate for women's rights (Complaint 7).

The physical assault by the dog is actionable pursuant to state law, e.g., Conn. Gen. Stat. §2-357. The acts of the judge's dog constitute a species of battery, an offensive touching. Offensive touching and apprehension of offensive touching are actionable as sex harassment offenses. Priest v. Rotary, 634 F. Supp. 571; Dockter v. Rudolf Wolff Futures, Inc., 684 F. Supp. 532; Crihfield v.Montsanto Co., 844 F. Supp. 378.

The plaintiff-petitioner ventured to the Danbury Superior Court with a simple objective: to review files in the clerk's office. Yet, a physical barrier presented itself to her, unsolicited and unprovoked. She was kept from pursuing her constitutionally protected objective, and she was unable to pursue the objective without suffering the offending probe of

the cold, wet snout under her skirt and up her legs to satisfy the judge's ritual. (Complaint 9, 10, 11, 12)

This conduct caused the plaintiff-petitioner to suffer extreme emotional distress; it was the judge's malicious intent to abuse his authority as a judge of the Superior Court to "frighten, shock, humiliate and vex the plaintiff as a woman for exercising her constitutionally protected right of access to the courts." (Complaint 24)

The dubious intrusion, regularly repeated, actually interfered with the plaintifff's right of access to the courts and caused actual injury to her constitutionally protected pursuit.

5. The complaint sufficiently alleges intentional violation of the plaintiff's right of access, equal protection and due process rights sufficient to withstand a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

The Court of Appeals determined, based on Lewis v. Casey, a prison inmate case, the plaintiff failed to sufficiently allege a deprivation of right-of-access claim; that the other constitutional claims pleaded, sounding in equal protection and

due process, necessarily derived from the right-of-access claim; and, with the failure of the right-of-access claim the entire complaint must fall.

The Court of Appeals ruling misconstrues the complaint.

First, as has been argued supra, the plaintiff sufficiently alleges a deprivation of right of access claim.

Second, the claims of denial of equal protection and due process are not derivative of the right-of-access claim and each such claim independently supports a §1983 cause of action here.

a. The equal protection and due process claims are independent of the right-of-access claim.

The Court of Appeals erroneously relies upon the word "thereby" as it is employed in Paragraph 25 of the complaint to affirm dismissal of the entire complaint.(Decision, page 11)

However, a closer reading of Paragraph 25 shows that it incorporates all of the preceding allegations of the complaint, some but not all of which, by any means, relate to right-of-

access, as providing the factual foundation for the ultimate claims of law regarding equal protection and due process. Thus, neither the equal protection claim nor the due process claim derives from or depends upon the right-of-access claim for legal vitality.

b. A §1983 denial of equal protection is sufficiently alleged.

The constitutional right to nondiscriminatory access to the courts arises from the equal protection clause of the Fourteenth Amendment. Lewis v. Casey, supra 628-39 (Thomas, J., concurring).

To bring a successful claim under §1983 for a denial of equal protection and to prove sexual discrimination, a plaintiff must show that any disparate treatment was based upon her gender. Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3rd Cir. 1990).

Sexual harassment by a state actor violates the rights protected by the equal protection clause. Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988). The Second Circuit has held that sexual harassment of women by state actors constitutes

disparate treatment because of gender and is actionable under §1983 as a denial of equal protection. Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 144 (2d Cir. 1993).

The U.S. Supreme Court declared eighteen (18) years ago that individuals have a constitutional right under the equal protection clause to be free from sex discrimination in public employment. Davis v. Passman, 442 U.S. 228, 234-35. Surely, women litigants, such as the plaintiff-petitioner, have a constitutional right to be free from sex discrimination in their exercise of a fundamental constitutional right, exercising the right of access to the courts.

The equal protection guarantee applies to all women, and the Supreme Court has long acknowledged that women are persons. "The Equal Rights Amendment Is the Way," Ruth Bader Ginsburg, 1 Harvard Women's Law Journal 19, 24 (1978).

Sexual harassment has been defined as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." 97 Harvard Law Review 1449, fn. 1 (1985). "Sexual harassment is the exploitation of a

powerful position to impose sexual demands or pressures on an unwilling but less powerful person. As an abuse of power that discriminates against members of a discrete and vulnerable group, sexual harassment violates the civil rights of its victims." Id. 1451.

Sexual harassment is widespread and pervasive in America. 17 Sexual Harassment and Judicial Review 27 (1994). Connecticut is no exception. (The New York Times, Connecticut Weekly, October 12, 1997, page 1) Increasingly, attention is being directed to sexual misconduct by judges. (See, e.g., "Sexual Harassment by Judges," 45 University of Miami Law Review 817 (1991). "Unquestionably, sexual harassment from the bench is the ultimate betrayal by the legal system. Judges embody ultimate power, and when they abuse it by sexually harassing or abusing those under their jurisdiction -whether lawyers, court employees, or women who come before them as defendants or victims -- our legal system is operating at its absolute nadir." "Getting Away With It: Judges and Sexual Misconduct," Judicial Misconduct, Massachusetts School of Law Review (Summer 1997).

The complaint sufficiently alleges a §1983 cause of action grounded in the equal protection clause.

C. A §1983 due process claim is sufficiently alleged.

Judge Moraghan, by the conduct alleged, has violated the plaintiff's 14th Amendment due process right to be free from state interference with her bodily integrity.

Individuals have a "historic liberty interest . . . encompassing freedom from bodily restraint and punishment." Ingraham v. Wright, 430 U.S. 651, 673-74. "This historic liberty interest is violated when a state actor sexually assaults or sexually molests anyone." Doe v. Taylor Indep. School District, 15 F. 3d 443, 451 (5th Cir.1994; U.S. v. Lanier, 33 F.3d 639, 645 (6th Cir. 1994) (A judge's wilful touching of a woman on or near her crotch while in his judicial chambers is actionable under the criminal counterpart to 42 U.S.C. §1983 as a violation of the woman's due process right to be free from offensive touching.)

As set forth in the complaint, the plaintiff-petitioner suffered violation of her bodily integrity by the defendant judge through the agency of his dog. (Complaint 8, 9, 10, 11,

14) She has sufficiently alleged a §1983 violation.

6. Conclusion

The Court of Appeals erroneously relied upon the U.S Supreme Court decision in Lewis V. Casey to dismiss the plaintiff-petitioner's right-of-access violation claim. Nevertheless, she sufficiently alleged actual injury as well as claims of equal protection and due process violation. The suit should not have been dismissed. The decision of the Court of Appeals for the second Circuit should be reversed and this case remanded to the district court for further proceedings.

THE PLAINTIFF-PETITIONER,
BARBARA MONSKY

Barbara S. Monsky

Barbara Monsky
Barbara Monsky, pro se
14 Shepard Road
Danbury CT 06810

No. _____

In The

Supreme Court Of The United States

October Term, 1997

BARBARA MONSKY,

Petitioner,

v.

HONORABLE HOWARD J. MORAGHAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BARBARA MONSKY For Herself And In Behalf Of All Women Similarly Situated	:	CIVIL ACTION NUMBER
Plaintiff	:	
V.	:	
HOWARD J. MORAGHAN, Individually and In His Official Capacity	:	
Defendant	:	SEPTEMBER 23, 1996

COMPLAINT

1. This is an action for injunctive relief and compensatory and punitive damages to redress the deprivation by the defendant of rights secured to the plaintiffs by the constitution and laws of the United States and the State of Connecticut. The defendant's dog committed offensive acts against the plaintiffs and the plaintiffs have thereby suffered deprivation of rights in a manner which discriminated against them because of their gender and

exercise of protected First Amendment rights.

2. Jurisdiction of this court is invoked under the provisions of Sections 1331, 1343(3) and 1367(a) of Title 28 and Sections 1981, 1983 and 1988 of Title 42 of the United States Code.

3. During all times mentioned in this action, the plaintiff, Barbara Monsky, was, and still is, an adult citizen of the United States residing in the State of Connecticut.

4. The plaintiff, Barbara Monsky, brings this action for herself and in a representative capacity in behalf of all women similarly situated as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The plaintiff, Barbara Monsky, represents that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative party are typical of the claims of the class, and (4) the representative party will fairly and adequately protect the interests of the class.

5. During all times mentioned in this action, the defendant Howard J. Moraghan was, and still is, a judge of the

Superior Court of the State of Connecticut. In this action, he is sued in his official capacity only with respect to the plaintiffs' request for injunctive relief and attorney fees; he is sued in his individual capacity for compensatory and punitive damages as well as for attorney fees and costs.

6. During all times mentioned in this complaint, the defendant was acting under color of state law, that is, under color of the Constitution, statutes, laws, rules, regulations, customs and usages of the State of Connecticut.

7. During all times mentioned in this complaint, the plaintiff, Barbara Monsky, was, and still, a litigant in the Superior Court, Judicial District of Danbury, State of Connecticut, in an action she instituted concerning a boundary dispute with her neighbor; the plaintiff, Barbara Monsky, during all times mentioned in this complaint, frequently has appeared at the clerk's office of the said Danbury Superior Court to examine the file in the civil action she had instituted as well as certain other Superior Court files.

8. During the past year, on no fewer than three (3) separate occasions while the plaintiff, Barbara Monsky,

was present in the public area of the clerk's office at the said Danbury Superior Court, she was approached from the rear without warning by a large unleashed and unmuzzled dog.

9. On each such occasion, the dog aggressively nuzzled the plaintiff, Barbara Monsky, in such a manner that it raised her skirt, poked its snout under her skirt and projected its snout upward toward the plaintiff's crotch.

10. On each such occasion, the plaintiff, Barbara Monsky, did nothing whatsoever to provoke such conduct by the dog.

11. On each such occasion, the owner and keeper of the dog, the defendant, Howard J. Moraghan, stood observing the dog's activity from a distance of several feet and did nothing to restrain the dog.

12. On each such occasion, after nuzzling the plaintiff, the dog proceeded to approach other women from the rear without warning and repeat the upward thrust of the snout, the raising of their skirts, and the projection of the snout upward toward the women's crotches.

13. On each such occasion, the owner and keeper

of the dog, the defendant, Howard J. Moraghan, stood watching from several feet away and did nothing to restrain the dog.

14. Each time the plaintiff was so nuzzled by the dog, she was startled by the unprovoked and offensive conduct and her sense of having been violated was heightened and intensified by her observation that on each such occasion the face of the defendant, Howard J. Moraghan, broke into a smirk as he observed the plaintiff's obvious discomfort.

15. On each such occasion, the defendant, Howard J. Moraghan, then quickly escorted the dog from the public area of the clerk's office into the secured and non-public area, without words being exchanged.

16. The conduct of the dog as described above caused the plaintiff to suffer extreme emotional distress.

17. The defendant, Howard J. Moraghan, is strictly liable to the plaintiff for injuries caused by the dog under state law, namely, Conn. Gen. Stat. §2-357, insofar as the defendant, Howard J. Moraghan, is the owner and keeper of the dog and the plaintiff did nothing to provoke the dog's

conduct.

18. The defendant is liable to the plaintiff for his negligent failure to restrain the dog and prevent its repeated offensive nuzzling of the plaintiff.

19. In repeatedly failing to restrain the dog from its offensive conduct, knowing that the dog, if unrestrained, would continue to practice its offensive conduct, the defendant, Howard J. Moraghan, intentionally inflicted emotional distress upon the plaintiff, and his conduct was extreme and outrageous.

20. The defendant, Howard J. Moraghan, knew or should have known that the dog, if unrestrained, would single out women in skirts, and the dog did repeatedly select women in skirts for offensive nuzzling, and did leave all other persons alone.

21. During all times mentioned in this action, the Plaintiff was engaged in exercising her constitutionally protected right of access to the courts within the public area of the clerk's office of the Danbury Superior Court.

22. The conduct of the defendant and the

defendant's dog, as described herein, interfered with the plaintiff's constitutionally protected right of access to the courts.

23. The conduct of the defendant as described herein was intentional and intended to harass the plaintiff as a woman for exercising her constitutionally protected right of access to the courts and thereby deprive her of her constitutionally protected rights to due process, equal protection of the law and First Amendment liberties.

24. The defendant abused his authority as a judge of the Superior Court maliciously to frighten, shock, humiliate and vex the plaintiff as a woman for exercising her constitutionally protected right of access to the courts.

25. Acting under color of state law, the defendant has thereby in the manner herein described deprived the plaintiff of her constitutionally protected rights to due process, equal protection of the law and First Amendment liberties.

26. The plaintiff has no adequate remedy at law.

WHEREFORE, the plaintiff claims judgment against the defendant as follows:

A. Compensatory damages in an amount this Court shall consider to be just, reasonable and fair;

B. Punitive damages in an amount this Court shall consider to be just, reasonable and fair;

C. Attorney fees and the costs of this action pursuant to 42 U.S.C. §1988;

D. A temporary and permanent injunction requiring the defendant forthwith to keep his dog away from the courthouse; and Such other relief as this Court shall consider to be fair and equitable.

CLAIM FOR JURY TRIAL

The plaintiff claims trial by jury of all issues in this case other than the claim for injunctive relief.

THE PLAINTIFF

By: _____

Nancy Burton
147 Cross Highway
Redding Ridge, CT 06876
Tel. 203-938-3952
Fax. 203-938-3168
Fed. Bar No. 10836
HER ATTORNEY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 316 -- August Term 1997

Argued: September 11, 1997 Decided: OCT - 2 1997

Docket No. 97-7015

BARBARA MONSKY, for herself and on behalf of all women similarly situated,
Plaintiff-Appellant,

V.

HONORABLE HOWARD J. MORAGHAN,
Defendant-Appellee.

Before: WINTER, Chief Judge, FEINBERG and NEWMAN, Circuit Judges.

Appeal from the December 9, 1996 judgment of the UnitedStates District Court for the District of Connecticut (Gerard L. Goettel, Judge) dismissing a complaint against a state judge under 42 U.S.C. S 1983 for lack of sufficient allegation of action under color of state law.

Affirmed on ground that, although color of law allegation is sufficient, complaint fails adequately to plead denial of

constitutional right of access to court.

Nancy Burton, Redding Ridge, Conn.
for plaintiff-appellant.

Robert J. Cooney, Williams, Cooney & Sheehy, Bridgeport, Conn. (Dennis M. Laccavole, Patricia Curtin, Goldstein Peck, Bridgeport, Conn., on the brief) , for defendant-appellee.

JON 0. NEWMAN, Circuit Judge:

This suit under 42 U.S.C. §1983, alleging a most unusual set of factual allegations, requires consideration of the "under color of law" element of section 1983 and the sufficiency of a claimed denial of the right of access to a court. The plaintiff, Barbara Monsky, contends that the defendant, Connecticut Superior Court Judge Howard J. Moraghan, violated her constitutional rights by permitting his dog to harass her and other women in the Clerk's office of the State Court while she was endeavoring to examine court files in connection with her state court lawsuit. Monsky appeals from the December 9, 1996, judgment of the District Court for the District of Connecticut (Gerard L. Goettel, Judge), dismissing her federal cause of action pursuant to Fed. R. Civ. P. 12 (b) (1) and 12 (b) (6) and declining to exercise supplemental jurisdiction over her state law claims. 947 F. Supp. 53 (D. Conn. 1996). Though we conclude that the District Court erred in ruling that the plaintiff failed to allege facts sufficient to support her assertion that the defendant acted under color of state law, we nonetheless affiirm because the plaintiff has not

sufficiently alleged an interference with any federally guaranteed right.

Background

The complaint, which we must accept as true for purposes of testing its sufficiency, alleges the following circumstances. On at least three occasions in 1995 and 1996, while Monsky was in the Clerk's office of the Danbury Judicial District in connection with then-pending state court civil litigation, Judge Moraghan brought his dog into the office and allowed the dog to approach her. She describes what occurred as follows:

> [T]he dog aggressively nuzzled the plaintiff. . . in such a manner that it raised her skirt, poked its snout under her skirt and projected its snout upward toward the plaintiff's crotch.

Complaint 9. On each occasion the dog.repeated the same nuzzling behavior with other women in the office. The defendant stood watching from several feet away, doing nothing to restrain the dog; eventually, the defendant "smirk[ed] as he observed the plaintiff's obvious discomfort,"

id. 14, and escorted the dog away without words being exchanged. The plaintiff alleges that she has suffered extreme emotional distress, that the defendant knew or should have known that the dog would single out women in skirts for this behavior, and that the defendant intended to "harass the plaintiff as a woman for exercising her constitutionally protected right of access to the courts." Id. 1 23.

The plaintiff, represented by counsel, brought an action pursuant to 42 U.S.C. §1983, seeking compensatory and punitive damages, as well as an order enjoining the defendant from bringing his dog to the courthouse.[4] The District Court granted the defendant's motion to dismiss. The Court appeared to dismiss pursuant to both Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Court ruled that the plaintiff had not alleged facts from which it was possible to conclude that the defendant was acting under color of'state law or authority. The Court applied the standard used to evaluate Rule 12 (b) (6) motions, 947 F. Supp. at 54,

[4] Monsky brought this as a putative class action, on behalf of herself and all other women similarly situated. The motion to certify a class was denied for mootness following the Court's dismissal of the underlying action.

but ultimately stated that it was dismissing for lack of subject matter jurisdiction, id. at 55.

Thereafter, the plaintiff moved to reconsider the dismissal and to amend the complaint by amplifying the allegations that the defendant acted under color of law. She alleged that a regulation of the Judicial District of Danbury prohibited dogs (except seeing-eye dogs) from the courthouse, and that the defendant had been permitted to have his dog in a position to harass the plaintiff only because of his position as a judge. The District Court denied both motions. Monsky v. Moraghan, 950 F. Supp. 476 (D. Conn. 1997). With respect to the motion to amend the complaint, the Court held that (1) the motion was not properly before it, since judgment had been entered and the plaintiff had not met the requisites for relief from judgment under Fed. R. Civ. P. 59(e) or 60(b), id. at 477, and that (2) even if the Court were to consider the motion to amend, the proposed amendments still failed to allege that the defendant acted under color of state law, id. at 477-78.

Discussion

1. Action Under Color of Law

Although the District Court said that it was granting the enabled to take the alleged actions only because of his judicial status. The allegations of the complaint would permit the plaintiff to prove that ordinary citizens were not permitted to bring their dogs into the Clerk's office (except for blind persons using seeing-eye dogs) , that Judge Moraghan was known to, and deferred to by, personnel of the office, and that he was allowed to enter the office with his dog and remain there during the alleged episodes because he was a judge. Such proof would permit a finding that the Judge's alleged actions were taken under color of state law or authority.

Our conclusion draws support from Harris v. Harvey, 605 F. 2d 330 (7th Cir. 1979), and United States v. Tarpley, 945 F.2d 806 (5th Cir. 1991). In Harris, the Seventh Circuit ruled that a judge acted under color of law when he wrote defamatory letters on official stationery. 605 F.2d at 337. In Tarpley, the Fifth Circuit ruled that an off-duty deputy sheriff acted under color of state law when he assaulted his wife's

former lover, identifying himself as a police officer and telling his victim that he could get away with it because is he was a cop. Both cases involved abuse of authority. Official status enabled the defendant in Harris to commit the defamation, 605 F.2d at 337 ("Judge Harvey was acting under color-of law by using the power and prestige of his state office"), and was asserted by the defendant in Tarpley to have permitted his committing the assault without accountability, 945 F.2d at 809 (defendant "claimed to have special authority f or his actions by virtue of his of f icial status 11) .

Cases such as Martinez v. Colon, 54 F.3d 980 (lst Cir. 1995), Hughes v. Halifax County School Board, 855 F.2d 183 (4th Cir. 1988), and Murphy v. Chicago Transit Authoritv, 638 F. Supp. 464 (N.D. 111. 1986), are distinguishable. In those cases, state employees who harassed their fellow employees were held not to have acted under color of law. As the Fourth Circuit explained in Hughes, since the plaintiff and the defendants were all relatively low-level maintenance workers and none had authority over any other, the defendants had abused no "authority" in harassing

plaintiff. See Hughes, 855 F.2d at 186-87. By contrast, Judge Moraghan's authority is alleged to have contributed significantly to the conduct of which the plaintiff complains. Though he is not alleged to have explicitly asserted his authority, the allegations permit the inferences that courthouse staff tolerated the alleged conduct only because of the Judge's role and that the Judge implicitly invoked the power and prestige of his office.

2. The Substantive Rights Allegedly Infringed

Although the complaint satisfies plaintiff's burden of alleging that the defendant was acting under color of state law, it fails to adequately allege a substantive violation of a federally guaranteed right.

The gravamen of the plaintiff's complaint is that the conduct of the defendant and his dog "interfered with constitutionally protected right of access to the courts." Complaint 22. It is well established that all persons enjoy a constitutional right of access to the courts, although the source of this right has been variously located in the First Amendment right to petition for redress, the Privileges and Immunitie Clause

of Article IV, section 2, and the Due Process Clauses of the Fifth and Fourteenth Amendments. See Morello v. James, 810 F. 2d 344, 346 (2d Cir. 1-987) ; see also Simmons v. Dickhaut, 804 F.2d 182, 183 (Ist Cir. 1986) (collecting cases). The right of access to courts extends beyond inere physical access to a Courtroom and a judge. For instance, the right of access may include affording prisoners who are preparing legal papers "adequate law libraries or adequate assistance from persons trained in the law," Blounds v. Smith 430 U.S. 817, 828 (1977), at least for those challenging their sentences or the conditions of confinement, see Lewis v. Casey, 116 *S.* Ct. 2174, 2182 *(*1996).

In order to establish a violation of a right of access to courts, a plaintiff must demonstrate that a defendant caused "actual injury," Lewis, 116 *S.* Ct. at 2179, ie., took or was responsible for actions that "hindered [a p7aintifflel efforts to pursue a legal claim," id. at 2180. As the Supreme Court has explained, the requirement of actual injury "derives ultimately from the doctrine of standings id. at 2179:

Plaintiff appears to argue that her right of access to the courts was violated because the harassing conduct committed or at least tolerated by Judge Moraghan burdened her ability to freely remain in the Clerk's office and consult materials relevant to her pending civil litigation. Plaintiff does not allege, however, that she cut short her visits to the Clerk's office or decided against returning on some future occasion. Nor does she claim that the defendant's behavior caused any prejudice to her pending state-court litigation.The only consequences she alleges are suffering "extreme emotional distress," Complaint 16, and being frightened, shock[ed], humiliated and vex[edl]," id. 24. At oral argument of this appeal, Monsky's counsel acknowledged that the alleged episodes had not caused prejudice to her litigation interests. Counsel stated that the defendant's behavior had affected Monsky's pursuit of litigation only by disturbing her as she consulted materials in the Clerk's office, thereby increasing the time needed to complete the task of reviewing those materials.

We do not doubt that hostile action toward a litigant could be so offensive as to effectively drive the litigant

out of a courthouse and thereby become the functional equivalent of a denial s of access. Cf. Chertkova v. Connecticut General Life Insurance Co., 92 F.3d 81, 89 (2d Cir. 1996) (constructive discharge from employ-ment). And the plaintiff may well have experienced the emotional distress and humiliation that she has alleged. However, though these effects, if proven, might be consequential damages components of a section 1983 claim in which actual injury to court access was sufficiently alleged, they are not the type of actual injury that gives rise to a constitutional claim of denial of access to the courts.

The inadequacy of the plaintif's court access claim renders her entire federal cause of action insufficient to survive a motion to dismiss. The complaint specifically alleges that the defendant's conduct denied the plaintiff her right of access "and thereby deprive(d] her of her constitutionally protected rights to due process, equal protection of the law, and First Amendment liberties." Complaint, 23 (emphasis added). The other constitutional deprivations are all alleged to be entirely derivative of the access claim, which we have ruled deficient.

The "thereby" link between the deficient court access claim and the other constitutional deprivations is explicitly repeated in paragraph 25 of the complaint. The amendened complaint repeats paragraphs 23 and 25 of the original complaint verbatim. Both were drafted by competent counsel. With the failure of the federal claims, the District Court properly declined to exercise supplemental jurisdiction over Monsky's state law claims for intentional infliction of emotional distress and for violation of Connecticut's "dog bite" statute, Conn. Gen. Stat. §22-357.

Conclusion

The District Court erred in dismissing the action on the ground that the plaintiff had failed to allege that the defendant acted under color of state law. However, because the plaintiff's pleading of a violation of a constitutionally protected right is insufficient, we affirm.